BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

SHAHIN EHTESHAMI
(Claimant)

PRECEDENT
BENEFIT DECISION
No. P-B-456
Case No. 86-10011

S.S.A. No.

BANK OF AMERICA
(Employer)

Employer Account No.

Office of Appeals No. LB-13991

The claimant appealed from the decision of the administrative law judge which held that the claimant was disqualified from receiving unemployment insurance benefits, and that the employer's reserve account was relieved of charges.

STATEMENT OF FACTS

The claimant was employed as an industrial engineering analyst for five and one-half years at a terminating monthly salary of $2130. He voluntarily resigned effective April 11, 1986.

Due to business reverses the employer had begun a reorganization of its workforce, eliminating some positions and redeploying its displaced personnel. Rather than simply terminating employees, the employer had unilaterally established an option program for such displaced employees. The claimant was notified that he was subject to redeployment, and therefore could participate in the employer's program. The claimant was not a union member and his employment was not covered by a collective bargaining agreement.

The program offered by the employer consisted of two options. Under Option One the claimant could submit his resignation within seven days and receive the equivalent of eleven weeks' salary. This was calculated by combining one week's salary for

each year the claimant had worked for the employer and six weeks' salary. Under Option Two the claimant would be retained at his usual salary for four weeks, during which time the employer's personnel department would make a computer analysis of its personnel requirements and attempt to find work within the company for the claimant, commensurate with his qualifications and current salary. If no position were found during the four-week period, the claimant could resign and receive one week's salary for every year of employment with the employer. The claimant decided to take Option One.

Prior to making his decision, the claimant and other employees were informed by the employer that it had been 100 percent successful in placing all 180 of its employees who had been placed on the redeployment list and had thereafter chosen the second option offered by the employer. However, there was no guarantee that suitable work would be found for the claimant. An unknown number of employees on the redeployment list had chosen the first option.

REASONS FOR DECISION

Section 1256 of the California Unemployment Insurance Code provides that an individual is disqualified from receiving benefits, and sections 1030 and 1032 of the code provide that the employer's reserve account may be relieved of charges, if the claimant left his most recent work voluntarily without good cause.

The first issue to be considered is whether there was a voluntary leaving or layoff. If it is decided the claimant voluntarily quit, then the issue will be whether there was good cause for the voluntary leaving. If a layoff occurred there would be no need for further inquiry since a layoff constitutes neither a discharge nor voluntary quit under section 1256 of the Code (Appeals Board Decision No. P-B-211).

In Appeals Board Decision No. P-B-37, the Appeals Board held that in determining the nature of a separation, it must first be determined who was the moving party in the termination. If the claimant left employment while continued work was available, then the claimant is the moving party. If the employer refused to permit an individual to continue working although the individual is ready, willing and able to do so, then the employer is the moving party.

Here, the employer offered to retain the claimant on its payroll for at least an additional four weeks. Even though there was no guarantee of permanent employment, work remained available to the claimant at his option at the time of leaving.

Accordingly, the claimant was the moving party and was not laid off by the employer.

Since there was a voluntary quit, we must determine if there was good cause for the decision to leave. In Appeals Board Decision No. P-B-27, the Appeals Board held that there is good cause for the voluntary leaving of work where the facts disclose a real, substantial, and compelling reason of such nature as would cause a reasonable person genuinely desirous of retaining employment to take similar action.

The Appeals Board in that case further stated:

> "Similar standards in varying language have been adopted by our courts. A consideration of the concept of good cause under the Code in California Portland Cement Company v. California Unemployment Insurance Appeals Board, 178 Cal.App.2d 263, 3 Cal. Rptr. 37, led the appellate court to cite with approval Bliley Electric Company v. Unemployment Compensation Board of Review, 158 Pa.Super. 548, 45 A.2d 898, wherein the Pennsylvania court stated in considering a statute similar to our own:
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> > '. . . However, in whatever context they appear, they connote, as minimum requirements, real circumstances, substantial reasons, objective conditions, palpable forces that operate to produce correlative results, adequate excuses that will bear the test of reason, just grounds for action, and always the element of good faith.'"

The court further stated in California Portland Cement that establishment of good cause under the Code is, in effect, the drawing of a legal conclusion from a particular set of facts, and that good cause cannot be determined in the abstract any more than any other legal conclusion.

We consider it important in evaluating the guidelines set forth in Appeals Board Decision No. P-B-27 to contemporaneously consider Section 100 of the Unemployment Insurance Code. That section establishes the underlying rationale of the unemployment insurance system; that is, to provide benefits for persons unemployed through no fault of their own so as to minimize the suffering caused thereby.

In Appeals Board Decision No. P-B-228 the claimant submitted a resignation to her employer because she was anticipating she would be fired for unsatisfactory performance on the job. In truth, the employer represented to the Department that had the claimant not resigned she would have been discharged in the near future. The Appeals Board in that case held the claimant did not have good cause to leave. The mere anticipation, even if well founded, of being discharged is not sufficient justification to leave work. We believe the rationale expressed in Appeals Board Decision No. P-B-228 is applicable to the case now before us, although we here deal with an anticipated layoff rather than a discharge.

It has been suggested that this case involves a voluntary separation falling within the purview of Stanford v. California Unemployment Insurance Appeals Board (1983), 147 Cal.App.3d 98, 195 Cal.Rptr. 1, and the 1984 amendment to section 1256. In Stanford the claimants were notified by their employer that a mandatory layoff was being instituted immediately. Pursuant to a collective bargaining agreement between the claimant's union and the employer, an employee who had high seniority could volunteer to be laid off in place of an employee of lesser seniority so long as the latter had at least two years' service. The claimant volunteered to take the place of an employee with lesser seniority, and chose to be "laid off." The Court of Appeal found the claimant had good cause to leave. The court relies on Douglas Aircraft Company v. California Unemployment Insurance Appeals Board (1960), 180 Cal.App.2d 636, 4 Cal.Rptr. 723, contending that while ". . . the collective bargaining agreement does not control the determination of eligibility for unemployment benefits, the terms of the bargaining agreement are not completely irrelevant, either. The terms of the bargaining agreement are a factual matrix at the time of separation." (Id at page 102)

In 1984 the Legislature in effect ratified the result in Stanford when it amended section 1256 to provide that a claimant is ". . . deemed to have left his or her most recent work with good cause if he or she elects to be laid off in place of an employee with less seniority pursuant to a provision in a collective bargaining agreement that provides that an employee with more seniority may elect to be laid off in place of an employee with less seniority when the employer has decided to lay off employees."

The case now before us is not covered by either the statute or the Stanford case. First, there was no layoff pursuant to a collective bargaining agreement, as required by the legislation. Second, there was no "seniority layoff" or "discretionary bump" provision in this employer's redeployment policy.

Finally, this claimant was not volunteering to quit in place of other workers who had less seniority and were in line for a layoff. In fact, the evidence is to the contrary insofar as no one in the redeployment list had been laid off.

After having given due consideration to the circumstances existent at the time the claimant chose to quit his job, we conclude that a person genuinely desirous of retaining employment would not opt for immediate unemployment when continued employment for a four-week period was a certainty and there was reason to believe permanent employment was in the offing.

DECISION

The decision of the administrative law judge is affirmed. The claimant is disqualified from receiving benefits and the employer's reserve account is relieved of charges.

Sacramento, California, July 7, 1987.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

ROBERT L. HARVEY, Chairman

GEORGE E. MEESE

J. RICHARD GLADE

JAMES S. STOCKDALE

CHARLES W. WARD

DISSENTING -
Written Opinion Attached:

LORETTA A. WALKER

DEBRA A. BERG

DISSENTING OPINION

We respectfully dissent from the decision of the majority. We believe that the claimant's job terminated because of action of the employer, and that the claimant was therefore essentially discharged for reasons other than misconduct.

To the Statement of Facts we would add that the claimant's unit, in the words of the bank's representative, had been "down-stepped significantly." Others in his unit had already been placed in new assignments before any of the reemployment options had been offered, and claimant was aware that his job was to be eliminated.

The first consideration is whether the claimant or the employer was the moving party in this case. If the claimant was the moving party, the separation is deemed a voluntary leaving, and the question is whether the claimant had good cause for the leaving. If the employer was the moving party, the separation is deemed a discharge from employment, and the question is whether the claimant was discharged for misconduct connected with work (Appeals Board Decision No. P-B-37).

The claimant's employment as an industrial engineer would end when the company offered to place him in a job search. During this period the claimant would not be occupied with his normal duties but would be placed, at least temporarily, in the entirely new task of finding himself work in a shrinking company. In light of his previous experience, it was as likely that he would not be appropriately employed in some other related position by the employer.

Since we regard the action of the employer in April as terminating the claimant, the claimant's entitlement must be based on whether he was discharged for misconduct.

Misconduct has been defined as an intentional violation of a material duty, which violation affects or tends to affect the employer's operation. Here there was no violation of duty. The claimant was under no obligation to change his duties and undergo the work search.

The evidence plainly establishes that subtle and continuous coercion was placed on the claimant in light of the probability of significant downstepping affecting his pay and status as an engineer. In essence, the claimant was pressured to resign his employment so that the employer could get on with its reduction

in force. The tactic was effective. This Board has held that a claimant who was forced to resign was in fact discharged (Appeals Board Decisions Nos. P-B-189 and P-B-218). In our view that is what transpired, be it ever so subtly, in this instance.

In short, we would reverse the administrative law judge, affirm the Department, and hold that the claimant's termination from employment was under nondisqualifying circumstances and that he should be entitled to unemployment insurance benefits.

LORETTA A. WALKER

DEBRA A. BERG